

NATURAL RESOURCES BOARD AGENDA ITEM

Item No. _____

SUBJECT: Recent Revisions to Federal Regulations for Permitting New Air Emission Sources

FOR: FEBRUARY 2003 BOARD MEETING

TO BE PRESENTED BY: Lloyd Eagan

SUMMARY:

On December 31, 2002, U.S.EPA published revised regulations that contain the process and criteria for permitting new air emission sources. These changes are extremely controversial. On December 31, 2002, nine states sued EPA in federal court challenging these new regulations, a tenth state filed suit in late January, and additional states are expected to file suits by the end of February. On January 30, 2002, eight states filed a motion to intervene in the first lawsuit in support of EPA's decision to revise the New Source Review (NSR) regulations. The purpose of this agenda item is to update you on the options that are available to the Department in responding to the revised NSR regulations recently promulgated by EPA.

RECOMMENDATION: Informational Item

LIST OF ATTACHED MATERIALS:

| | | | |
|--|---|---|----------|
| No <input checked="" type="checkbox"/> | Fiscal Estimate Required | Yes <input type="checkbox"/> | Attached |
| No <input checked="" type="checkbox"/> | Environmental Assessment or Impact Statement Required | Yes <input type="checkbox"/> | Attached |
| No <input type="checkbox"/> | Background Memo | Yes <input checked="" type="checkbox"/> | Attached |

APPROVED:

Bureau Director, Lloyd Eagan

Date

Administrator, Jay Hochmuth

Date

Secretary, Scott Hassett

Date

cc: Linda Jahns - AD/5
Jay Hochmuth - AD/5
Lloyd Eagan - AM/7
JoAnne Kloppenburg - DOJ
Jordy Jordahl - Governor Doyle's Office

DATE: February 10, 2003

TO: Natural Resources Board Members

FROM: Scott Hassett - Secretary

SUBJECT: Background Memo on Recent Revisions to Federal New Source Review Regulations

On December 31, 2002, the United States Environmental Protection Agency (EPA) published regulations that significantly change the way new sources of air pollution are permitted. These revisions alter the applicability of the regulations in such a way that the New Source Review (NSR) program will no longer regulate many projects that were covered by the old rule. In addition, application of the new rule will, in many cases, result in less restrictive emission limits than those authorized by the old rule. The attachment to this memo provides further details on the changes EPA has made to the federal NSR program.

Litigation

The new NSR regulations are extremely controversial. Ten states (New York, Connecticut, Massachusetts, Maryland, Maine, New Hampshire, New Jersey, Rhode Island, Vermont and Pennsylvania) have filed lawsuits challenging EPA's decision to revise the NSR program, claiming that the revised regulations will result in emission increases that will have a variety of negative impacts, such as making the achievement of air quality standards for ozone more difficult. Nine of the states filed a lawsuit together on December 31, 2002.

Pennsylvania filed its own lawsuit in late January. We understand that several other states are considering filing suit against EPA over the rule revisions by the end of February. Eight states (Indiana, Kansas, North Dakota, South Carolina, South Dakota, Utah and Virginia) have filed a motion to intervene in the first lawsuit in support of EPA's regulatory changes. Wisconsin must decide what, if any, action to take regarding EPA's decision to revise the NSR program. Here are the options we have:

- 1) File a lawsuit challenging the new regulations, by March 3, 2002
- 2) Intervene in Pennsylvania's lawsuit by February 26, 2003.
- 3) File an amicus brief in support of the challenge to the new regulations.
- 4) Intervene in support of the new regulations.
- 5) File an amicus brief in support of the regulations.
- 6) Do not initiate or get involved in any legal action regarding this matter.

All options, except for the no action option, require prior authorization by the Governor. Any lawsuit must be filed by March 3, 2003 (and therefore mailed out by February 28). Therefore, a decision on whether the Department will recommend that the Governor authorize suing EPA must be made by February 27, 2003.

Intervention in a lawsuit must be accomplished within 30 days after the lawsuit has been commenced. Wisconsin is too late to intervene in the northeastern states' lawsuit.

Wisconsin Rule Revisions

Regardless of any legal action taken, since Wisconsin has incorporated the federal NSR permitting requirements into our regulations, we will have to respond to these new federal regulations within our own air program. Decisions on what features of the new NSR regulations should be implemented in Wisconsin must be made and in place by January 2, 2006. We basically have three options:

- 1) Do not adjust our rules to reflect any of the federal changes.
- 2) Incorporate portions of the new federal regulations into state administrative rules.
- 3) Incorporate all of the new federal regulations into state administrative rules.

To this end, we will be seeking input from internal and external stakeholders, other state permitting authorities, EPA, and national air quality regulatory organizations (STAPPA/ALAPCO, ECOS, etc.) to determine how to implement these changes in the best interest of the citizens of Wisconsin. The Department realizes that there were many features of the previous NSR regulations that were in need of improvement. The January 2, 2006 deadline represents an excellent opportunity to develop a consensus on new source review changes amongst the wide variety of stakeholders that have an interest in this matter.

ATTACHMENT A

Changes to the Federal NSR Program

The new NSR regulations differ significantly from the former regulations. Because Wisconsin incorporated the former regulations into our administrative rules, Wisconsin's NSR program now differs significantly from the Federal program. If we decide to change our rules for permitting new air emission sources, we must also update our State Implementation Plan (SIP) before the new rules can become effective in the State. Because EPA believes that the changes they have made will result in environmental improvements over their former NSR program, EPA expects that most of the states with NSR programs approved by EPA, such as Wisconsin, will update their programs within 3 years of the new Federal regulations taking effect. Section NR 1.52, Wis. Adm. Code sets forth the procedures for making such changes to State regulations in these instances. The timeline for making changes in Wisconsin differs from the process in States with delegated programs (not SIP approved programs, such as those in Michigan, Minnesota and Illinois). In delegated states, their programs must conform to the federal NSR regulations as soon as they become effective, in this case by March 3, 2003.

Complexities within the former NSR program have been alleged to be a barrier to plant modifications that would increase efficiencies and better control air pollution. While some of the changes EPA has made to the program will simplify it, others will not. More importantly, it is quite likely that some of these changes (baseline actual emissions, projected future actual emission, clean unit designation and plantwide applicability limitations) will result in more air pollutants being released than under the former NSR regulations because fewer projects will be required to be reviewed under the NSR program resulting in fewer sources being required to install state of the art emission controls. As a result, it may become more difficult for Wisconsin to meet the air quality standard for ozone in counties along Lake Michigan, due to pollutants transported into this region from emissions in Western and Southern states.

Appendix 1 contains a detailed description of the changes EPA has made to the NSR regulations, how the new program differs from the former program and the potential environmental impact of each change. It should be noted that although many of these regulatory modifications will exempt facility changes from the NSR program, permitting such changes under the State's minor modification program is still likely. EPA recognizes this to be the case and in fact relies on such state permitting programs to provide for review of the air quality and other environmental impacts. However, this type of review, i.e. a review that's based on state rules, does not necessarily lead to the same level of emission reductions that would result from the application of the provisions of the former NSR regulations.

EPA is also proposing additional revisions be made to the NSR regulations in regard to routine maintenance, repair and replacement. The deadline for submitting comments on these proposed changes is March 3, 2003. The NSR program currently excludes routine maintenance, repair and replacement activities that occur at facilities. However, the way this exclusion is implemented by EPA can be highly subjective. Therefore, EPA has proposed a more defined method for addressing whether a project would fit into this exclusion. This proposal seeks to establish a "safe harbor" under which a facility could physically change its equipment as long as the cost of doing so falls within the "safe harbor" amounts. These dollar figures would be based upon varying percentages established by industry type ranging from 1.5% to 15%, excluding any cost associated with pollution control equipment installation or maintenance. This approach to addressing this issue of uncertainty with regard to the implementation of this exclusion is very likely to result in more confusion. It would allow large-scale modification projects to be excluded from the regulatory approval process and would defeat the concept of the NSR program with regard to "grandfathered" units becoming subject to control requirements over time.

APPENDIX 1

NSR Regulation Changes Finalized on December 31, 2002

1. Baseline Actual Emissions

Historical emissions from a source play a primary role in determining the applicability of the NSR regulations both in the former program and the revised program. Previously, actual emissions were determined using the two most recent years of source operation. An alternative 2 year period could have been used if the permitting authority agreed with the source that it was more representative of plant operations. EPA has revised this period to be any 24 consecutive month period in the previous 10 years. The new program allows sources to pick which 24 month period they feel best represents their emission rates at their most productive state. While there is some ability to adjust this emission rate to reflect decreases that may be brought on by regulatory programs, the source is able to select its highest emission period in the last 10 years as the beginning point in applicability determinations, regardless of whether the emission rate is truly representative of current operations. This method of calculating historic actual emissions is available to all types of sources with the exception of electric steam generating utilities, where a 5 year period is used instead of ten.

2. Methodology for Calculating Emission Increases

Currently, emission increases brought on by plant modifications are calculated by examining the emission rate of a source in its recent history of operation and comparing that to the rate that the modified source could potentially emit in the future. The new NSR regulations change the way both ends of this equation are calculated. Under the new regulations, baseline actual emission rates, as discussed above, are used to determine historical emissions. Instead of evaluating the potential capability of a source to emit in the future, past operational patterns are taken into account and are used to predict emission rates following the plant modification, with an additional allowance for demand growth. Calculated emission increases are then compared to pollutant specific thresholds to determine whether the NSR program is applicable to the project. Since the calculated emission increase can only be smaller under the new method of calculation than that of the former, fewer plant modifications will be subject to the NSR program, and thus fewer projects will be required to utilize best available control technology (BACT).

This method of calculating emission increase is available to all types of air pollution sources, including electric steam generating utilities. However, use of the projected future actual emission rates are an optional election for the source and do come with additional record keeping and reporting requirements. Sources can instead choose to use the future allowable emission rate of the source and avoid the record keeping and reporting requirements.

3. Plantwide Applicability Limitations (PALs)

The new NSR regulations establish a program by which a facility's emissions of a regulated pollutant are capped using a plantwide applicability limitation (PAL). Multiple PALs can be issued to a facility so that emissions of several regulated pollutants are restricted. The former regulations contained no such program. As long as a facility is able to comply with their PAL(s), changes may occur at the facility without obtaining a permit under the NSR program. The emission limitation used to establish the PAL is developed using the facility's baseline actual emission rate plus the allowable emissions of the PAL regulated pollutant from equipment that is installed after the period used to establish baseline actual emission rate plus an additional margin for insignificant growth. There is no prerequisite that emission included in the baseline actual emission calculation be

controlled to qualify for inclusion in the PAL when it is initially set. Thus, the PAL provides more benefits to facilities that are currently operating without emission controls than those that are currently controlled.

Under the revised NSR regulations, PALs are established for a period of 10 years. Sources that find that they will need to increase their PAL to accommodate a new emissions unit or modification of an existing emissions unit may do so. However such increases require emissions controls be placed on all significant sources of the pollutant regulated by the PAL at the facility. While this aspect of the PAL regulation does promote control of emissions, it does so without the assurance of emission decreases at the facility, as such an increase will only be sought if a source will need to emit a level that exceeds its PAL rate. Thus the net effect can not result in emission decreases under this program, especially since a portion of the PAL is based on emission rates other than those that the environment has actually observed.

4. Clean Unit Applicability Test

Emissions units that have installed pollution control equipment that was, at the time of installation, considered BACT are classified as “clean units” under the NSR rule changes. Like the PAL, this concept is also new to the NSR regulations. To qualify as a “clean unit”, a capital investment into a particular control technology (including pollution prevention and work practices) has to have been made to control pollutant emissions to levels substantially as effective as BACT. Qualification as a clean unit is maintained for a period of ten years and can be applied retroactively. Modifications to emissions units that qualify under the clean unit applicability test are not subject to NSR provisions provided the unit will continue to meet its allowable emission limits following the modification. Although the retroactive nature of this test does generate some cause for concern, if applied proactively the clean unit test does provide for environmental benefits as sources will apply greater consideration to emission control investments to gain clean unit status.

5. Pollution Control Project Exclusion

Projects that are classified as pollution control and prevention measures are to be excluded from the NSR program under this concept. Prior to this rule change, pollution control and prevention projects were excluded from the NSR program for utilities by rule and for other source categories by EPA policy. The change in regulation establishes this policy into the regulation and sets forth provisions on classification of such projects. Qualifying projects under this program must be conducted on existing emissions units and result in a “net environmental gain”. EPA has provided a listing of qualifying projects within the regulation that it considers to have a net environmental gain. Facilities choosing to embark on a pollution control project may do so by providing notice to the permitting authority and are not required to obtain concurrence in order to proceed. It should be noted, that it is likely that projects that qualify as pollution control projects will still be required to obtain a construction permit under the State program prior to proceeding. However, EPA places much emphasis and trust into the State construction permit programs to ensure that collateral impacts from pollution control projects will not result in ambient air quality problems.